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No.

In The

Supreme Court of the United States

October Term, 1980

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, Individually and In His Official Capacity; and EDWARD W. MAHER, Individually and in His Official Capacity,
Petitioners,

vs.

WINNIE TEAL, DAVID MALMSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK and LINDA BROOKS,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Where selections for promotion are made from a pool of eligible candidates, whether a black plaintiff in an action brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, may make a prima facie showing of employment discrimination under a disparate impact analysis by establishing (1) that entry into the promotional eligibility pool is dependent solely upon passing a promotional examination; and (2) that the examination disproportionately excludes black candidates, including the plaintiff from the eligibility pool, even though final selections from the pool of eligibles generated by the examination do not evidence disparate results.

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STATEMENT OF THE CASE

This case involves a Title VII challenge to an employment test developed and used by the State of Connecticut to determine eligibility for promotion to the position of Welfare Eligibility Supervisor within the Department of Income Maintenance of the State of Connecticut. At the outset, it should be emphasized that this is not a case involving an examination process consisting of various sub-tests or components. To the contrary, the examination process employed by the State of Connecticut to determine eligibility for appointment consisted of a single component, the test in question. Thus, the present case does not present the question of whether a plaintiff is able to establish a Title VII prima facie case of discrimination under a disparate impact theory by proving that one component or sub-test of an examination made up of various subtests or components has an adverse impact, where the results of the overall examination process fails to evidence an adverse impact. Instead, this case presents the question of whether a plaintiff is able to establish a Title VII prima facie case of race discrimination under a disparate impact analysis based upon the admittedly disparate results of an examination process, composed of a single test, that excluded a disproportionate number of black candidates from qualifying for promotion, where the actual selections made from the pool of successful candidates does not yield disparate results.

As the facts of the present case reveal, the plaintiffs, Winnie Teal, Rose Walker, Edith Latney and Gracie Clark, are black American citizens employed by the State of Connecticut, Department of Income Maintenance. Several of the plaintiffs' supervisors testified at trial that the plaintiffs possessed the qualifications for permanent positions as supervisors and praised their performance on the job.

Eligibility for appointment on a permanent basis was determined on the basis of the results of a written examination. Those candidates who passed the written examination formed an eligibility pool from which the State was allowed in its discre-

tion, to select persons to fill the permanent positions. Only if a candidate passed the written examination was he considered eligible for promotion on a permanent basis. Those candidates who failed to attain a passing grade on the test were eliminated from all consideration for promotion.

The written test was administered on December 2, 1978 to 329 candidates. The mean score on the test was 70.4 percent. The black candidates, however, had a mean score of 6.7 percentage points lower than the white candidates, a disparity that the defendants admitted was statistically significant. It was only after the test was corrected that a passing point was set by the State. Knowing full well that a cut-off score of 65 would eliminate from eligibility a disproportionately large number of black candidates, including the plaintiffs, the State, nevertheless, set the passing score at 65. With the passing score set at 65, the following results were obtained:

Candidate Group	Number	Number Receiving Passing Score	Passing Ratio (%)
Black	48	26	54.17
Hispanic	4	3	75.00
Indian	3	2	66.67
White	259	206	79.53
Unidentified	15	9	60.00
Total	329	246	74.77

The above table reveals that the passing rate of the identified black candidates (54.17%) was approximately 68 percent that of the passing rate of the identified white candidates (79.53%). All four of the plaintiffs received a score on the written examination lower than 65. This disparity in the passing rates between black candidates and white candidates was labeled by the State's own expert witness as statistically significant. In addition, a comparison of the pass rates between black candidates and white candidates established that it contravened the four-fifths rule of the Uniform Guidelines on Employee Selection

Procedures prepared by the Equal Employment Opportunity Commission, 29 C.F.R. Section 1607.4(d) (1979). The plaintiffs were thus denied promotional consideration due solely to the fact that they failed to attain a passing grade on an examination that admittedly had a disparate impact on black candidates. Faced with these results, the plaintiffs instituted this action claiming that the written examination discriminated against them on account of their race in violation of Title VII.

As previously discussed, candidates who failed to achieve a passing grade on the examination were eliminated from all consideration for appointment. Those who passed the examination were ranked on an eligibility list in order of their test scores. All candidates achieving the same test score were assigned an identical ranking. The scores of the 246 candidates who passed the examination were grouped into 25 separate rankings.

In filling vacancies, the State's merit system allows the State to make appointments from any of the candidates whose scores fall within a given number of rankings. The number of rankings from which the State is allowed to choose candidates for appointment is determined by taking the number corresponding to the number of vacancies and adding four to it. Selection of candidates from these rankings need not be made in any particular order.

Thus, in the present case, since there were 46 vacancies to be filled, the State, theoretically, could have chosen for promotion any candidate whose name appeared within the 50 highest rankings. However, since the scores of all 246 passing candidates fell within 25 separate rankings, the State, in its discretion, was permitted to choose for promotion from any of the passing candidates regardless of their rank order. Hence, again as acknowledged by the State, the results of the examination were, in fact, used on a pass-fail basis. Those candidates who passed the test were all eligible for promotion on an equal basis, while those who failed were eliminated from any consideration.

More than a year after this action was instituted, and approximately one month prior to trial, the defendants made their first promotions from the eligibility list generated by the written examination. Forty-six persons were promoted to permanent supervisory positions, eleven of whom were black and thirty-five of whom were white. Of the forty-eight identified black candidates who entered the selection process, eleven, or approximately 23 percent were promoted; of the 259 identified white candidates who applied, thirty-five, or about 13.5 percent were promoted. Thus the actual promotion rate of blacks (23 percent) was approximately 170 percent that of the actual promotion rate (13.5 percent) of identified whites.

REASONS FOR DENYING CERTIORARI

I.

The defendants in their petition for certiorari argue that the United States Court of Appeals for the Second Circuit erred in holding that, under Title VII of the Civil Rights Act of 1964, as amended, 42 USC Section 2000e et seq.

> "[w]here a plaintiff establishes that a component of a selection process produced disparate results *and* constituted a pass-fail barrier beyond which the complaining candidates were not permitted to proceed, a prima facie case of disparate impact is established, notwithstanding that the entire selection procedure did not yield disparate results." *Teal* v. *Connecticut,* No. 80-7675, slip op. at 2103, 2105 (2d Cir. Mar. 26, 1981)

No claim of error is made as to the factual findings relied upon by the Court of Appeals in reaching its decision. The defendants do not dispute that the examination eliminated a disproportionately large number of black candidates, including the plaintiffs, from consideration for promotion. Nor do the defendants dispute that the test constituted a pass-fail barrier beyond which the plaintiffs were not allowed to proceed. That the plaintiffs were excluded from consideration for promotion solely on the basis of an examination that produced discriminatory results is beyond question.

The defendants contend that regardless of these facts the plaintiffs failed to establish a prima facie case of race discrimination under Title VII because, from the pool of candidates who passed the examination, the State selected for permanent appointments a disproportionately large number of black candidates. In other words, the State claims that even though the composition of the eligibility pool may have been the result of a discriminatory examination, the plaintiffs are without redress under Title VII because the final selections made by the State

from that discriminatory eligibility pool did not adversely impact against black candidates.

This argument, as the Court of Appeals held, completely overlooks the discrimination suffered by the plaintiffs in being excluded from the eligibility pool solely on the basis of the results of the examination.

> "In the case at bar, an employee selection device produced a readily discernible disparate impact upon the black candidates. The affirmative action effort taken by the defendants at the end of the process was 'of little comfort to the candidates who were not permitted to proceed beyond the allegedly discriminatory pass-fail barrier."
>
> "Title VII was designed to protect the rights of individuals. 'It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race...' *Furnco Construction Corp.* v. *Waters,* supra, 438 U.S. at 579. 'A primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees...An equally important purpose of the Act is 'to make persons whole for injuries suffered on account of unlawful employment discrimination.' *International Brotherhood of Teamsters* v. *United States,* supra, 431 U.S. at 364. Permitting the overall selection process result in this case to validate what may be the denial of the employment opportunity to a disproportionate number of black candidates is an expedient that transgresses the purpose of Title VII. Where an employment practice forecloses a disproportionate number of persons in a protected group from a job opportunity, it matters very little to the victimized individuals that their group as a whole is well represented in the group of hirees. '[G]ood intent or absence of discriminatory intent

> does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.' *Griggs* v. *Duke Power Co.*, supra, 401 U.S. at 432" *Teal* v. *Connecticut*, supra at 2116, 2117

The defendants claim that the Court of Appeals decided this issue in a way contrary to the interpretation of Title VII by the Supreme Court in other cases. It claims that its position on this issue correctly adheres to prior Supreme Court decisions. To the contrary, the ruling of the Court of Appeals and the rationale supporting it are firmly grounded in prior Supreme Court decisions.

Commencing with its decision in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971), the Supreme Court has been consistent in holding that employment devices that disproportionately *"exclude"* minority applicants from employment opportunities are presumptively violative of Title VII unless such practices are shown to bear a demonstrable relationship to successful performance of the job for which they are used.

In *Griggs* v. *Duke Power Company*, supra, at p. 431, the Supreme Court held that employment practices which operated to exclude Negroes from employment opportunities were prohibited by Title VII unless shown to be job-related in the following words:

> "Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has — to resort again to the fable — provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If

> an employment practice *which operates to exclude* Negroes cannot be shown to be related to job performance, the practice is prohibited. *Griggs* v. *Duke Power Company,* supra, at p. 431. (Emphasis supplied)

The Court used the following language in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802, fn. 14 (1973) in addressing the question of what devices may properly be used to test qualifications for employment:

> "We note that the issue of what may properly be used to test qualifications for employment is not present in this case. Where employers have instituted employment tests and qualifications with an *exclusionary effect* on minority applicants, such requirements must be 'shown to bear a demonstrable relationship to successful performance of the jobs' for which they were used..." (citations omitted.) (emphasis supplied)

The Court went on to explain its holding in *Griggs,* supra

> "But Griggs differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, *operated to exclude many blacks who were capable of performing effectively in the desired positions.* Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives..." *McDonnell Douglas Corp.* v. *Green,* supra at 806 (Emphasis supplied)

And again in *International Brotherhood of Teamsters* v. *United States,* 341 U.S. 324, 348, 349,

> "[t]he primary purpose of Title VII was 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have

> fostered racially stratified job environments to the disadvantage of minority citizens'...To achieve this purpose, Congress 'proscribe[d] not only overt discrimination but also practices that are fair in for *but discriminatory in operation*'...Thus, the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group..." (Citations omitted)

See also the concurring opinion of Justice Marshall in *Furnco Const. Corp.* v. *Waters,* 438 U.S. 567, 583, (1978):

> "Where the Title VII claim is that a facially neutral employment practice actually falls more harshly on one racial group, thus having a disparate impact on that group, our cases establish a different way of proving the claim...As set out by the Court in *Griggs* v. *Duke Power Company,* supra, to establish a prima facie case on a disparate impact claim, a plaintiff need not show that the employer had a discriminatory intent but need only demonstrate that a particular practice in actuality 'operated to exclude Negroes'..." (citations omitted)

See also the dissenting opinion of Justice White in *New York City Transit Authority* v. *Beazer,* supra, at p. 598:

> "In a disparate impact hiring case such as this, the plaintiff must show that *the challenged practice excludes members of a protected group* in numbers disproportionate to their incidence in the pool of potential employees..." (emphasis supplied)

And in *Dothard* v. *Rawlinson,* 433 U.S. 321 (1977) the Supreme Court ruled that the statutory height weight requirements for employment as a correctional counselor with the Alabama Board of Corrections was violative of Title VII in that

these requirements worked disproportionately to exclude women from eligibility for employment. Although these facially neutral employment standards were but two of various eligibility requirements, id at p. 327, the Court focused on the exclusionary effects of the height and weight requirements in ruling that they were violative of Title VII.

> "The gist of the claim that the statutory height and weight requirements discriminate against women does not involve an assertion of purposeful discriminatory motive. It is asserted, rather, that these facially neutral qualification standards work in fact disproportionately to exclude women from eligibility for employment by the Alabama Board of Corrections." *Dothard* v. *Rawlinson,* supra at p. 328, 329.

As in the present case, the facially neutral qualification standards in *Dothard* constituted a pass-fail barrier which disproportionately excluded members of a protected class from eligibility for employment. The controlling statistics were those that demonstrated the disproportionate exclusion of women from eligibility for employment. Similarly, in the present case, the controlling statistics are those that demonstrate the disproportionate exclusion of black candidates from eligibility for promotion. Once the plaintiffs established this disproportionate effects, a prima facie case of employment discrimination is proved and it becomes the defendants burden to prove business necessity. *Dothard* v. *Rawlinson,* supra.

That the defendants, in making the promotions they have to date, appointed a greater percentage of black candidates who passed the test than their incidence in the eligibility pool would statistically command, does not negate the fact that the testing device being the sole criteria for determining eligibility for promotion, disproportionately excluded black candidates from having an opportunity to be promoted. More specifically, the fact that more fortunate black candidates passed the test and received promotions does not alter the consequences that the

examination, which disproportionately excluded black applicants, had on the black plaintiffs in the present case.

The language employed in *Furnco Constr. Corp.* v. *Waters,* supra at p. 579, although a "disparate treatment" case, is equally applicable to the present case.

> "...it is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force..."

The fact that other more fortunate members of their race overcame the discriminatory screening device does not remedy the discrimination they suffered.

II.

The position espoused by the defendants also runs counter to the fundamental principle underlying Title VII, equality of treatment for individuals.

> "The statute makes it unlawful 'to discriminate against any *individual* with respect to his compensation, terms, conditions or privileges of employment, because of such *individual's* race, color, religion, sex or national origin.' 42 U.S.C. Section 2000e-2(a) (1) (emphasis added) The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class..."

> "Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes..." *City of Los Angeles* v. *Manhart,* 435 U.S. 702, 709, (1978)

The language of the Court of Appeals takes cognizance of Title VII's focus on the individual.

> "Where, however, an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process, a different result must obtain. Otherwise we would be adopting the position that regardless of the language of the statute Congress intended Title VII to protect faceless groups rather than individuals. Title VII cannot be interpreted to permit an obvious denial of employment opportunities to candidates that is solely attributable to non-job-related characteristics they possess that are inherent to their race." *Teal* v. *Connecticut,* supra, 2112, 2113.

> "Permitting the overall selection process result in this case to validate what may be the denial of an employment opportunity to a disproportionate number of black candidates is an expedient that transgresses the purpose of Title VII. Where an employment practice forecloses a disproportionate number of persons in a protected group from a job opportunity, it matters very little to the victimized individuals that their group as a whole is well represented in the group of hirees." *Teal* v. *Connecticut,* supra, 2117

III.

In further support of their petition for certiorari, the defendants claim that there exists a conflict among the Courts of Appeal of the various circuits on this issue. However, as discussed below, the decision of the present case is in harmony with the holdings of the various decisions cited by the defendants.

The first case cited by the defendants, *EEOC* v. *Greyhound Lines,* 635 F2d 188 (3d Cir. 1980), did not involve an employ-

ment test, but concerned a "no beard" policy. Initially, the Court seriously questioned the efficacy of assessing the claim of discrimination presented in that case under a disparate impact theory, id at p. 190, fn. 3, and then proceeded to hold that the plaintiff did not sustain its burden of proving its case because of its failure to introduce evidence establishing the disproportionate impact of the no beard policy on black males, id at p. 191 and 192, fn. 5.

Where, however, as in the instant case, there is a readily discernible group of employees who have been subjected to a readily identifiable employment practice and the impact of that practice on the protected class has been demonstrated through the introduction of competent evidence, a prima facie case would be established under *EEOC* v. *Greyhound,* supra.

The holding of the second case cited by the defendant, *Friend* v. *Leidinger,* 588 F2d 61 (4th Cir. 1978) must be read in conjunction with *U.S.* v. *County of Fairfax, VA,* 629 F2d 932 (4th Cir. 1980). In the latter case, a case similar to the present one, the Court explicitly declined to rule on the theoretical validity of the so-called "bottom line" defense.

> "[W]e do not address the County's 'bottom line' defense, by which it contends that sufficient numbers of blacks were hired even if the employment tests, which allegedly constitute only a part of the hiring process, were discriminatory. *We pass no judgment on the theoretical validity of this defense..." U.S.* v. *County of Fairfax, VA,* supra, fn. 13.

Thus, contrary to the defendants' contention, the fourth circuit has taken no position on the theoretical validity of the bottom line defense advanced by the defendants in the instant case. Instead, it has held in *Friend* v. *Leidinger,* supra only that an examination is not to be fractured into its component subtests, a situation not present in the matter now before the Court which concerns an examination with but a single component.

Similarly, the decision of *EEOC* v. *Navajo Refining Co.*, 593 F2d 988 (10th Cir. 1979) and *Smith* v. *Troyan*, 520 F2d 492 (6th Cir. 1975) cert. denied, 426 U.S. 934 (1976) are not inconsistent with the case at bar. In the latter case, a disparate impact case, the sixth circuit rejected a plaintiff's attempt to fragment an examination process in an effort to challenge one subtest, a written "General Classification Test." In that case, the examination was made up of various subtests that did not act as individual pass-fail barriers, but instead the scores on the subtests were cumulative, giving rise to one overall passing score. See *Teal* v. *Connecticut*, supra at p. 2111, 2112.

Likewise, in *EEOC* v. *Navajo Refining Co.*, supra, the employer required a high school diploma or G E D equivalent and a minimum score on an aptitude test as prerequisites for entry-level employment. Fewer Spanish surnamed Americans than "Anglos" met these requirements but Navajo used statistical adjustments to equalize the scores of the different groups. The tenth circuit's decision rejecting plaintiff's attack on the test also is in harmony with the holding of the instant case.

> "Since *all* of the candidates in such a process would have been afforded the opportunity to receive the benefit of the offsetting mechanism...the overall results of the process should be deemed a fair barometer of the fairness of the process." *Teal* v. *Connecticut*, supra at p. 2115.

IV.

Finally, the defendants claim that employers, who have no intent to discriminate, need guidance from the Supreme Court as to whether they are to be subject to the necessity of establishing the validity of their tests under the facts of the present case. However, the Supreme Court has consistently ruled that under a disparate impact theory proof of discriminatory motive is not required. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), *Albermarle* v. *Moody*, 422 U.S. 405 (1975); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324

(1977); *Dothard* v. *Rawlinson,* 433 U.S. 321 (1977), and that once the adverse impact of the test is demonstrated, the employer must meet the burden of showing the test bears a manifest relation to the employment in question. *Griggs,* supra; *Dothard* v. *Rawlinson,* supra.

Conclusion

For all the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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